Recent arbitration developments in East Africa

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Trade and investment between the Middle East and Africa continues to grow, and this is set only to accelerate with the coming into force of the African Continental Free Trade Area ('AfCFTA'). AfCFTA is the largest free- trade area in the world based on the number of participating countries since the World Trade Organization was formed. Broadly speaking, AfCFTA requires member states to remove tariffs from most goods and allow free access to commodities, goods, and services across the African continent. This is expected to have spill-over effects with Africa's trade partners outside the continent. For example, the Dubai Chamber of Commerce and Industry forecasts that Dubai's trade with Africa could see an annual increase of up to 10 per cent over the next five years following the implementation of AfCFTA.

With increased trade and investment between the regions, commercial disputes will inevitably follow, and many of these disputes, as with cross-border disputes
generally, will be resolved through arbitration. Accordingly, it is important for arbitration users in the Middle East trading or investing in Africa to keep abreast of arbitration- developments on the continent. Two
important recent developments in this regard in nearby East Africa are: (1) Ethiopia's recent accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention') and; (2) Tanzania's new arbitration law.

Ethiopia's ratification of the New York Convention

The New York Convention is the cornerstone of the international arbitral legal regime. It requires parties to recognise and enforce arbitration agreements and arbitration awards in their domestic legal systems, subject to limited exceptions. The New York Convention has broad coverage globally with the vast majority of states across the world having ratified the convention over the past six decades since the convention was adopted in 1958.

Until recently, one notable hold-out on the African continent was Ethiopia. This changed, however, when Ethiopia acceded to the New York Convention on 24 August 2020, thereby becoming the 165th party to the convention. Following Ethiopia's accession, the New York Convention formally came into force for Ethiopia on 22 November 2020. This is an important and welcome development for one of Africa's fastest growing economies (notwithstanding the recent internal strife Ethiopia has experienced). Ethiopia's accession is subject to three reservations. Two of these reservations arise under Article I.3 of the New York Convention:

1) the "reciprocity reservation", i.e., Ethiopia will apply the New York Convention only to recognition and enforcement of awards made in the territory of another contracting state, and; (2) the "commercial reservation", i.e., Ethiopia will apply the New York Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.

The third reservation made by Ethiopia is that the Convention will not apply retroactively. While such a reservation is not expressly found in the text of the New York Convention, several other states have nevertheless made this sort of reservation (namely Bosnia and Herzegovina, Croatia, Malta, Montenegro, North Macedonia, Moldova, Serbia, Seychelles, and Tajikistan).

Ethiopia’s accession to the New York Convention falls in the midst of several other accessions by African states recently, including Sierra Leone in October 2020, Seychelles in February 2020, Maldives in September 2019, and Cabo Verde and Sudan in March 2018.

Tanzania’s new Arbitration Act

Whereas Ethiopia has taken an important step at the international treaty level to bolster its arbitration framework, Tanzania has revamped its legal framework for arbitration at the national level. Tanzania recently passed a new national arbitration law, the Arbitration Act 2020 (the ‘Tanzanian Arbitration Act’), that came into force in February 2020 and replaces the Arbitration Act 1931.

Tanzania’s decision to follow the English Arbitration Act model has garnered some criticism from commentators. One concern that has been raised is that the English Arbitration Act is tailored specifically for the English legal system and that it will not be easily transplantable to another jurisdiction.

Another concern surrounds the fact that the Tanzanian Arbitration Act, like the English Arbitration Act, provides for potentially wider discretion for judicial intervention in comparison to the UNCITRAL Model Law. For example, sections 69-71 of the Tanzanian Arbitration Act provide for a more comprehensive system for the challenge of awards, relatively similar to sections 67-69 of the English Act. Section 71 in particular follows the English Arbitration Act model by effectively providing for a right to appeal a question of law determined by an arbitral tribunal to a court (i.e., “state in a form of special case to the court”, which is the language used in the Tanzanian Arbitration Act). While this provision is used sparingly in the English courts, it remains to be seen whether the Tanzanian courts will follow a similar approach in this regard.

At the end of the day, however, the Tanzanian Arbitration Act incorporates the key fundamental provisions that one would expect to see in a national arbitration law. It has also made an important advancement on the institutional side by establishing the Tanzania Arbitration Centre (‘TAC’) for the conduct and management of arbitration (Section 77). The TAC will maintain a list of accredited arbitrators and provide educational opportunities relating to arbitration.

It remains to be seen whether the Tanzanian Arbitration Act will render international arbitration in Tanzania more attractive to foreign investors with the prospect of judicial intervention being a concern. Nevertheless, it is safe to conclude that the new law should be considered a hopeful step towards a more arbitration friendly future for Tanzania.

Notably, the Tanzanian Arbitration Act is based largely on the English Arbitration Act rather than the UNCITRAL Model Law on International Commercial Arbitration (the ‘UNCITRAL Model Law’), which is more commonly used by states as the template for their national arbitration law. Indeed, several other jurisdictions in Africa that incorporate (at least some elements of) common law, including Kenya, Nigeria, South Africa, and Uganda, have based their arbitration law on the UNCITRAL Model Law.

Conclusion

With continued growth in trade and investment between the Middle East and Africa, it behoves users of arbitration in both regions to stay on top of developments in the respective regions. The recent developments in Ethiopia and Tanzania demonstrate a commitment among African states to further enhance their legal frameworks for arbitration and may have a practical impact sooner rather than later with the continued growth of arbitration as a means of resolving cross- border disputes.

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